

**PUBLIC HEALTH APPEAL BOARD**

**IN THE MATTER OF THE *PUBLIC HEALTH ACT*  
R.S.A. 2000 c. P-37 AND THE REGULATIONS**

**AND IN THE MATTER OF THE APPEAL OF THE DECISION  
OF THE ALBERTA HEALTH SERVICES WAIVER  
COMMITTEE, DATED JULY 17, 2024**

---

PANEL: Kevin Kelly, Chair  
Paul M. Bourassa, Member  
David Rolfe, Member  
Vicki Wearmouth, Member

BETWEEN: )  
)  
JU HO (JOE) KIM )  
(Appellant) ) Self-Represented  
)  
- and - )  
)  
)  
ALBERTA HEALTH SERVICES )  
(Respondent) ) Ashley Groenewegen,  
) Alberta Health Services,  
) for the Respondent  
)  
)  
) Heard via Videoconference:  
) September 19, 2024  
)

---

**DECISION AND REASONS FOR DECISION**

---

On July 29, 2024, the Public Health Appeal Board (the “Board”) received a notice of appeal (the “Appeal”) to reverse the decision of the Alberta Health Services Waiver Committee (the “AHS Waiver Committee”) issued July 19, 2024, concerning the business identified as the Duffield Food Store and Café (1586083 Alberta Ltd.), located at adjacent lots 38 and 44 Railway Avenue, Duffield, Alberta T0E 0N0 (the “Property”). The Property includes a gas station, post-office, convenience store, and a currently closed food handling business (the “Restaurant”).

## **The Appeal**

[1] Ju Ho (Joe) Kim, a representative of the owner of the Property made an application to the AHS Waiver Committees to waive the 10-metre minimum requirement for the distance between a watertight septic tank and a well that supplies water for the Property that is intended or used for human consumption, which 10-metre minimum distance is required pursuant to sections 15(1) and 15(2) of the *Nuisance and General Sanitation Regulation* (the “Nuisance Regulation”).

[2] The distance between the septic tank and the well for the Property is 8.9 metres.

[3] In its July 19, 2024 decision (the “AHS Waiver Committee Decision”), the AHS Waiver Committee refused to waive the 10-metre minimum requirement.

[4] The owner representative, Ju Ho (Joe) Kim is appealing to the Board, asking it to reverse the AHS Waiver Committee Decision, as it limits operating a Restaurant on the Property, which had been operating as far back as 1989 and up to 2015.

## **Board Decision**

[5] The hearing for the Appeal began and concluded on September 19, 2024. Ju Ho (Joe) Kim (the “Appellant”) and the Respondent made submissions and presented evidence. At the conclusion of the hearing, the Board informed the parties that it would provide its written decision within 60 days.

[6] On September 20, 2024, the Board sent to the parties a short decision letter, without reasons, confirming the AHS Waiver Committee Decision.

[7] These are the Board’s reasons for confirming the AHS Waiver Committee Decision.

## **Background**

[8] The Appellant made an application to the AHS Waiver Committee, requesting it to waive the 10-metre minimum requirement for distance between a watertight septic tank and a well that supplies water for the Property that is intended for human consumption, which is required pursuant to sections 15(1) and 15(2) of the Nuisance Regulation.

[9] Applications for waivers are permitted pursuant to section 1(1) of the Waiver Regulation 298/2003, which permits a person to whom a provision of any of the regulations under the *Public Health Act* (the “PHA”) applies to request to the regional health authority for an order waiving or mitigating the application of the provision. The regional health authority may decide to waive the application of a provision of a regulation where it is satisfied that the application of the provision would cause hardship to the applicant in the particular case and, an adequate degree of protection of the public health would be maintained.

[10] The hearing for the waiver application made by the Appellant to the AHS Waiver Committee was held on July 17, 2024. On July 19, 2024, the AHS Waiver Committee issued its decision, which rejected the application for an order to waive section 15(1) of the

Nuisance Regulation on the basis that neither the test of hardship, nor the test of adequate degree of protection of the public health were proven.

[11] On July 29, 2024, the Board received the Appeal to reverse the AHS Waiver Committee Decision.

### **Timing of Appeal**

[12] Section 5(3) of the PHA requires the Appellant to serve the notice of an appeal on the Board and the regional health authority within 10 days after receiving notice of the decision being complained of.

[13] The AHS Waiver Committee Decision is dated July 19, 2024. The Board received the Appeal on July 29, 2024. The Appeal was therefore served on time.

### **Grounds of the Appeal**

[14] The Appellant states the following grounds of appeal:

“The decision limits business operation and the ability to move forward. It cuts down customer base without being able to use all avenues of the location and business.”

### **Legal Issues**

[15] The legal issue on the Appeal for consideration by the Board is:

- a. Whether the Board should confirm, reverse or vary the AHS Waiver Committee Decision.

### **Jurisdiction**

[16] There were no objections to the composition of the panel for the Board (the “Panel”) or the Board’s jurisdiction to hear the Appeal.

### **Documents/Exhibits**

[17] Prior to the commencement of the hearing, the following documents were entered as exhibits by agreement of the parties:

- a. Exhibit A – AHS Waiver Committee Decision
- b. Exhibit B – Notice of Appeal of the Appellant
- c. Exhibit C – AHS Written Submission
- d. Exhibit D – AHS Disclosure: Package Provided for July 17, 2024 AHS Waiver Committee Hearing
- e. Exhibit E – AHS Disclosure: Meeting Recording – Waiver Hearing Duffield Food Store and Café.

### **Submissions of the Appellant**

[18] The Appellant made submissions but did not call any evidence to support the reversal or variance of the Alberta Waiver Committee Decision. The Appellant expressed his frustration that the previous businesses operating the Restaurant were issued the necessary permits for food handling, which he argued meant there were no issues with the minimum distance requirement between a watertight septic tank and a well that supplies water for the Property that is intended or used for human consumption.

[19] The Appellant tried to enter into evidence, information regarding a “Water Quality Management Plan” (the “Plan”). The Board decided not to admit it to evidence as the Plan had no bearing on the Appeal hearing and the Appellant did not comply with the timelines for submission.

### **Submissions of the Respondent**

[20] Alberta Health Services (AHS) submitted that it will rely on the evidence presented at the Waiver Committee hearing.

[21] The Waiver Committee found that it does not have the authority to waive current Regulation requirements for past requirements that are no longer codified. Under the PHA, a public health order can be issued to require remedial work to be undertaken to bring the property into compliance with more recent standards. Based on this, the Appellant’s “grandfathering” argument was not considered.

[22] AHS submitted that the Waiver Committee Decision was reasonable and should be confirmed by the Board.

[23] The Appellant did not demonstrate before the Waiver Committee that he would suffer any consequence beyond what is directly imposed by the statutory and regulatory framework and, as such, did not meet the test for “hardship”.

[24] Little information was available to ascertain the integrity of the well or the septic tank. No recent inspections had been done and a recent water sample (July 5, 2024) showed a positive result for total coliforms, raising a concern about direct contamination from the septic tank. There is a potential risk of gastrointestinal illness from consuming contaminated water.

[25] With the lag time seen between the presence of coliforms in the water and the detection by sample testing, AHS submitted that the Waiver Committee Decision that regular well water testing would not provide an adequate degree of protection of the public health in all circumstances was reasonable.

### **Analysis and Reasons**

[26] The Board has the authority to hear appeals of the AHS Waiver Committee under section 7 of the Waiver Regulation which states:

## Appeal of a Decision

*7. A person who is directly affected by a decision of a regional health authority to grant or refuse an order under this Regulation and considers himself or herself aggrieved by the decision may appeal the decision to the Public Health Appeal Board under section 5 of the [Public Health] Act.*

[27] Section 5(1) of the PHA defines the “decision of a regional health authority as:

- (a) an order issued under section 62, and*
- (b) a decision to issue or to cancel, suspend or refuse to issue a licence, permit or other approval provided for in the regulations, and any other decision in respect of which an appeal to the Board is permitted under the regulations, whether any of those decisions is made by the regional health authority itself or one of its employees or agents.*

[28] The applicable section of the PHA regarding appeals that the Board must consider include the following:

*5(11) The Board may confirm, reverse or vary the decision of the regional health authority and shall give written notice of its decision to the appellant and the regional health authority.*

## Standard of Review

[29] After a thorough consideration of the *Newton*<sup>1</sup> factors and in accordance with the Alberta Court of Appeal’s guidance in *Moffat*<sup>2</sup> and *Yee*<sup>3</sup>, and reading the relevant sections of the PHA and Waiver Regulation harmoniously with the intention of the legislation, the Board is satisfied that the appropriate standard of review to be applied in this Appeal has been articulated in section 62(1) of the PHA.

This standard is whether there are reasonable and probable grounds to believe that a nuisance exists on the property or there is a contravention of the PHA or the regulations and standards based on an inspection or a report or test such that the decision under appeal is warranted.

[30] In *Canada (Minister of Citizenship and Immigration) v Vavilov*<sup>4</sup>, the Supreme Court of Canada provided instruction on the application of the reasonableness standard of review. The focus of reasonableness review is on the reasons. A decision will be reasonable if it is both

---

<sup>1</sup> *Newton v Criminal Trial Lawyers’ Association*, 2010 ABCA 399 [*Newton*].

<sup>2</sup> *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 [*Moffat*].

<sup>3</sup> *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98.

<sup>4</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

internally consistent and justified in light of the legal and factual constraints that bear on the decision.<sup>5</sup>

[31] Unlike the judicial review approach established in *Vavilov*, the standard of review adopted by the Board represents a hybrid procedure. This approach involves reviewing all the relevant records supplemented with *viva voce* evidence, while also allowing portions of the hearing to be conducted on the record. As the Board is not a court, it is not bound by the strict rules of evidence applicable to courts. However, the Board's authority is limited to confirming, reversing, or varying an AHS order or decision, without extending beyond these options as provided in the PHA.

[32] In conclusion, by adopting this hybrid standard of review, the Board can effectively balance the need for procedural flexibility and thoroughness with respect for the specialized expertise and initial findings of the AHS executive officers, in the case of the Appeal, the Alberta Waiver Committee Decision. This approach ensures that the appeal process remains efficient and cost-effective, while preserving the integrity of the original proceedings and allowing the Board to make well-informed decisions that uphold public health standards in consistence with the objectives of the PHA.

### **Findings and Conclusion**

[33] AHS has relied on the evidence provided at the waiver hearing and provided no further evidence. The Appellant provided no evidence or submissions to support the reversal or variance of the AHS Waiver Committee Decision.

[34] The Appellant had information regarding a proposed Water Quality Management Plan and, while it had no bearing on the outcome of the Appeal hearing, the Board suggested that he provide this information to the Environmental Public Health Department and the Waiver Committee for their consideration.

[35] The decision of the AHS Waiver Committee is confirmed and remains in effect until the requirements in the Nuisance Regulation are met or an order to waive the minimum 10 metre minimum requirement for the distance between a watertight septic tank and a well that supplies water for the Property that is intended or used for human consumption has been granted.

**--Original Signed--**  
 Kevin Kelly, Chair  
 On behalf of the Hearing Panel of  
 the Public Health Appeal Board

---

Date

---

<sup>5</sup> *Vavilov*, at paras 99-101.